RECORD AND BRIEFS

No. 16-1116

In the Supreme Court of the United States

CHARLOTTE JENKINS, Warden,

Petitioner,

v.

PERCY HUTTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. HUTTON CANNOT RECONCILE THE CONFLICTS CREATED BY THE SIXTH CIRCUIT'S ACTUAL-INNOCENCE HOLDING 2

A. Hutton's Arguments Conflict With *Sawyer* 2

B. Hutton Cannot Minimize The Circuit Conflicts 5

C. Hutton's Alternative Ground For Excusing His Default Offers No Basis To Deny Review 7

II. HUTTON DOES NOT JUSTIFY THE SIXTH CIRCUIT'S EXTENSION OF *RING* TO BAR APPELLATE REWEIGHING OF A WEIGHING-STAGE ERROR 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Black v. Workman,
682 F.3d 880 (10th Cir. 2012) 7

Calderon v. Thompson,
523 U.S. 538 (1998) 4

Clemons v. Mississippi,
494 U.S. 738 (1990) 8, 11

Harrington v. Richter,
562 U.S. 86 (2011) 8

Hill v. Mitchell,
842 F.3d 910 (6th Cir. 2016) 9

Hurst v. Florida,
136 S. Ct. 616 (2016) 10, 11, 12

Hutton v. Mitchell,
No. 1:05-cv-2391, 2013 WL 4060136
(N.D. Ohio Aug. 9, 2013) 9

In re Bohannon v. State,
No. 1150640, 2016 WL 5817692
(Ala. Sept. 30, 2016) 12

Jones v. Barnes,
463 U.S. 745 (1983) 8

Kansas v. Carr,
136 S. Ct. 633 (2016) 11

Kansas v. Marsh,
548 U.S. 163 (2006) 11

Martinez v. Ryan,
566 U.S. 1 (2012) 9, 10

Morris v. Carpenter,
802 F.3d 825 (6th Cir. 2015) 10

Ring v. Arizona,
536 U.S. 584 (2002) 1, 10, 11

Rocha v. Thaler,
626 F.3d 815 (5th Cir. 2010) 6

Sawyer v. Whitley,
505 U.S. 333 (1992) 2, 3, 4, 6

Schlup v. Delo,
513 U.S. 298 (1995) 4, 5

Smith v. Robbins,
528 U.S. 259 (2000) 8

State v. Belton,
__ N.E.3d __, 2016-Ohio-1581
(Ohio 2016)..... 3, 4, 12

State v. Cole,
443 N.E.2d 169 (Ohio 1982) 9, 10

Stewart v. LaGrand,
526 U.S. 115 (1999) 9

Strickland v. Washington,
466 U.S. 668 (1984) 5, 7, 8

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 9, 10

United States v. Fields,
483 F.3d 313 (5th Cir. 2007) 12

Wooten v. Norris,
578 F.3d 767 (8th Cir. 2009) 7

During the guilt phase of Percy Hutton's capital trial, a jury found him guilty of two aggravating circumstances that made him death-penalty eligible. At the penalty phase, the jury found that the aggravating circumstances outweighed the mitigating factors and recommended a death sentence. The Sixth Circuit granted Hutton relief from this sentence because the penalty-phase instructions purportedly failed to tell the jury that the two aggravating circumstances that it had found at the *guilt* phase were the ones to be balanced against the mitigating factors at the *penalty* phase. The Sixth Circuit reached this procedurally defaulted jury-instruction claim under a theory—the actual-innocence exception—that Hutton never argued. And it held that appellate reweighing could not cure the purported instructional error by extending the jury-trial rule from *Ring v. Arizona*, 536 U.S. 584 (2002), to a jury's weighing-stage finding that the aggravating circumstances outweigh the mitigating factors.

The petition demonstrated that the decision below broke new ground in two dramatic respects, and so merits this Court's attention. *First*, the Sixth Circuit's surprise holding that Hutton is "actually innocent" of the death penalty conflicts with this Court's cases and with circuit cases. *Second*, the Sixth Circuit's extension of the Sixth Amendment's jury-trial guarantee into a capital trial's weighing stage likewise conflicts with this Court's cases and with cases from other appellate courts.

Hutton's responses do nothing to diminish the magnitude of the Sixth Circuit's legal errors. The Court should grant the petition for certiorari.

I. HUTTON CANNOT RECONCILE THE CONFLICTS CREATED BY THE SIXTH CIRCUIT'S ACTUAL-INNOCENCE HOLDING

The petition showed that the Sixth Circuit's application of the actual-innocence exception to procedural default conflicts with this Court's cases and with other circuit decisions. Hutton's arguments do not reconcile these conflicts.

A. Hutton's Arguments Conflict With *Sawyer*

The actual-innocence exception applies in rare cases in which a habeas petitioner can "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Hutton's expansive reading of *Sawyer*'s exception is incompatible with that case.

1. *Eligibility v. Weighing Stage.* The petition explained that *Sawyer* limited the actual-innocence exception to death-penalty *eligibility* factors, and refused to extend it to *weighing* factors concerning whether the aggravating circumstances outweigh the mitigation evidence. Pet. 19. Hutton responds that *Sawyer* contains "no 'eligibility' versus 'weighing'" distinction. Opp. 5. That is incorrect. *Sawyer* held that "the 'actual innocence' requirement must focus on those elements that render a defendant *eligible* for the death penalty." 505 U.S. at 347 (emphasis added).

Hutton retorts that the weighing of aggravating and mitigating circumstances *itself* is an "element" of death-penalty eligibility under *Sawyer*. Opp. 4-7.

Yet *Sawyer* rejected an extension of the exception into the weighing stage, where the jury makes "the ultimate discretionary decision between the death penalty and life imprisonment." 505 U.S. at 343. It expressly identified this proposed extension as the "most lenient" view of the exception, *id.*, but then went on to *reject* that lenient view, *id.* at 345-47.

To claim the contrary, Hutton identifies a sentence from *Sawyer* that the exception can apply if "'there was no aggravating circumstance'" *or* if "'*some other condition of eligibility had not been met.*'" Opp. 5-6 (quoting *Sawyer*, 505 U.S. at 345). The reference to "some other condition of eligibility" does not expand the exception into the weighing stage. *Sawyer* explained that "the term 'innocent of the death penalty'" turned on proof that would be "confined by . . . statutory definitions to a relatively obvious class of relevant evidence." 505 U.S. at 345. While the state law in *Sawyer* used the phrase "aggravating circumstance" to narrow the eligible class, *id.* at 341-42, *Sawyer*'s reference to "some other condition of eligibility" merely recognized that the "[s]tatutory provisions for restricting eligibility may, of course, vary from State to State," *id.* at 345 n.12.

Hutton is also wrong that the weighing of aggravating and mitigating circumstances is a condition of eligibility *under Ohio law*. Weighing does not occur in Ohio until "*after* the fact-finder has found a defendant guilty of one or more aggravating circumstances." *State v. Belton*, __ N.E.3d __, 2016-Ohio-1581 ¶ 59 (Ohio 2016), *cert. filed* (Mar. 24, 2017) (No. 16-8526). Those aggravating circumstances make a defendant "eligible for a capital sentence." *Id.* The

subsequent weighing does not "'increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Id.* ¶ 60 (citation omitted).

2. *Legal v. Factual Innocence.* The petition explained that *Sawyer*'s exception turns on a petitioner's factual innocence of an eligibility factor. Pet. 16-17. In response, Hutton *nowhere* claims that he did not kidnap Derek "Ricky" Mitchell or kidnap and attempt to kill Samuel Simmons, Jr.—the *factual* underpinnings of the aggravating circumstances that made him death-penalty eligible. Opp. 1-15. Indeed, Hutton admits that "the foundation of [his] claim is legal." Opp. 7. But he argues that his claim "is also a factually based claim" because "the specifics of what the jury did not find is the factual innocence proof." *Id.* This mystifying sentence appears to be another way of saying that Hutton relies on a legal error (a purportedly erroneous jury instruction) to excuse his default. *Even if* the jury did not rely solely on the two aggravating circumstances from the guilt phase, Hutton bore the burden of presenting new evidence that he did not *factually commit* those circumstances. *See Calderon v. Thompson*, 523 U.S. 538, 559-60 (1998). Thus, he does not reconcile the decision below with *Sawyer*'s teaching that "the miscarriage of justice exception is concerned with actual as compared to legal innocence." 505 U.S. at 339.

3. *Gateway v. Constitutional Claim.* The petition explained that an actual-innocence claim is distinct from a constitutional claim. Pet. 17, 20-21. Citing *Schlup v. Delo*, 513 U.S. 298 (1995), Hutton responds that "the evidence to lift the default can be the same

evidence that supports the underlying Constitutional violation." Opp. 7. True enough. But while the *evidence* supporting an actual-innocence claim may also support a constitutional claim, *Schlup* clarifies that the *claims* are distinct. 513 U.S. at 315-16.

In that case, the petitioner argued that evidence of his innocence had been withheld by the State (a *Brady* claim) and inadequately developed by counsel (a *Strickland* claim). *Id.* at 307. Both claims were defaulted. *Id.* at 307-09. The Court began its analysis by noting the "important" distinction between the petitioner's "procedural" argument (the default should be excused because he did not commit the murder) and his "substantive" claims (*Brady* and *Strickland*). *Id.* at 314. "His constitutional claims [were] based not on his innocence, but rather on his contention that the ineffectiveness of his counsel . . . and the withholding of evidence by the prosecution . . . denied him the full panoply of protections afforded . . . by the Constitution." *Id.*

In this case, by contrast, Hutton has a defaulted constitutional claim of error but *no* gateway claim of innocence to overcome his procedural default. "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Id.* at 316.

B. Hutton Cannot Minimize The Circuit Conflicts

The petition explained that the Sixth Circuit's expansive view of the actual-innocence exception con-

flicts with many circuit decisions. Pet. 22-27. In response, Hutton distinguishes a few cases on fact-specific grounds. Opp. 7-8. He ignores many other cases cited by the petition, and does not reconcile the decision below with the cases that he cites.

Hutton initially distinguishes *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), because it "evaluate[d] a state's procedural default [rule] as an independent and adequate state rule." Opp. 7. Yet the rule in *Rocha* "'codif[ied], more or less, the doctrine found in *Sawyer*.'" 626 F.3d at 822 (citation omitted). Thus, the Fifth Circuit identified "[t]he precise meaning of the phrase 'actually innocent of the death penalty,' as defined by" *Sawyer*. *Id.* at 823. And it concluded that *Sawyer* "expressly rejected the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon a defendant who is unquestionably *eligible* for it under state law can . . . excuse" a default. *Id.* (internal quotation marks omitted). That reading conflicts with the Sixth Circuit's opinion—which held that *Sawyer* extends into the discretionary weighing phase.

Hutton distinguishes other cases as "address[ing] the impact of *Sawyer* on claims that additional evidence would have changed a sentencing calculation." Opp. 7-8. He ignores the *reason* that these courts rejected that evidence: The actual-innocence exception does *not* reach the weighing of aggravating and mitigating factors. "[E]ven if state law considers the outweighing of mitigating circumstances by aggravating circumstances [to be] an 'element' of a capital sentence," the Tenth Circuit held, "it is not an element for purposes of the actual-innocence inquiry."

Black v. Workman, 682 F.3d 880, 916 (10th Cir. 2012). Likewise, the Eighth Circuit held that "courts may not consider the jury's penalty-phase balancing function" when analyzing actual-innocence claims. *Wooten v. Norris*, 578 F.3d 767, 781 (8th Cir. 2009). The Sixth Circuit held just the opposite.

All told, Hutton cannot square the decision below with these cases, or with many others cited in the petition. That circuit conflict warrants review.

C. Hutton's Alternative Ground For Excusing His Default Offers No Basis To Deny Review

Departing from the actual-innocence exception, Hutton alternatively argues that various ineffective-assistance claims show cause and prejudice to excuse his default. Opp. 8-12. As he did in the Sixth Circuit, he alleges that his *appellate* counsel was deficient for not raising the waived jury-instruction claim and a corresponding ineffective-assistance-of-trial-counsel claim. *Id.* He now appears to allege that his *state post-conviction counsel* was deficient for failing to raise the ineffectiveness of his trial and appellate counsel. *Id.* The Sixth Circuit properly rejected the appellate-counsel argument, and Hutton's new post-conviction argument is meritless.

1. *Direct-Appeal Claim.* Applying the deference owed to the Ohio Supreme Court under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Sixth Circuit correctly held that Hutton's appellate-counsel claim lacks merit under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 25a-27a; *id.* at 46a & n.2 (Rogers, J., dissenting). This claim

fails if "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). This is a "'doubly'" deferential test. *Id.* (citation omitted).

The Ohio Supreme Court reasonably concluded that appellate counsel acted reasonably. Pet. App. 254a-256a. Contrary to Hutton's suggestion, Opp. 10-11, this Court has declined to "impose on appointed counsel a duty to raise every 'colorable' claim." *Jones v. Barnes*, 463 U.S. 745, 754 (1983). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citation omitted). Here, it was not ineffective for counsel to decline to raise a jury-instruction claim that would have been subject to plain-error review. Pet. App. 255a. And with respect to the trial-counsel claim, the Ohio Supreme Court did not find that issue "'clearly stronger'" than the arguments that appellate counsel did present. Pet. App. 256a (citing *Robbins*, 528 U.S. at 288). That, too, was reasonable. Pet. App. 26a-27a.

Even if Hutton could show deficient appellate performance, he cannot show prejudice. *Strickland*, 466 U.S. at 692. As the district court noted, any jury-instruction error would have been cured by appellate reweighing under *Clemons v. Mississippi*, 494 U.S. 738 (1990). Pet. App. 162a-163a. So such an error could not have changed "the result of the trial." Pet. App. 163a-164a.

2. *Post-Conviction Claim.* Hutton's insinuation that his *post-conviction* counsel's ineffective assistance excuses the default also lacks merit. The rules

of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), do not provide any alternative basis for denying review here.

As a procedural matter, this argument is waived because Hutton failed to raise it below. *See Stewart v. LaGrand*, 526 U.S. 115, 120 (1999). *Martinez* and *Trevino* were decided before the district court ruled on Hutton's petition, but Hutton did not present timely arguments about those cases. *Hutton v. Mitchell*, No. 1:05-cv-2391, 2013 WL 4060136, at *2 (N.D. Ohio Aug. 9, 2013) (denying motion to amend judgment premised on *Martinez* and *Trevino*). And the Sixth Circuit rejected Hutton's request for a remand so that he could pursue *Martinez* issues. Order, 6th Cir. R.45, at 3.

As a substantive matter, Hutton's argument fails because (1) his trial-counsel claim should have been brought on direct appeal, and (2) his appellate-counsel claim was adjudicated on the merits in state court. Beginning with the trial-counsel claim, *Martinez* and *Trevino* do not apply in Ohio to ineffective-assistance claims that rely on the *trial record*. *Cf. Hill v. Mitchell*, 842 F.3d 910, 937 (6th Cir. 2016). In Ohio, those *record-based* claims are pursued on *direct appeal*. Thus, "[w]here [a] defendant, represented by new counsel upon direct appeal, fails to raise" record-based claims of ineffective assistance, "*res judicata* is a proper basis for dismissing [a] defendant's petition for postconviction relief." *State v. Cole*, 443 N.E.2d 169, 170 (Ohio 1982). As Hutton must concede by alleging ineffective assistance of *appellate* counsel for failing to raise the ineffectiveness of *trial* counsel, the jury-instruction and trial-counsel claims here are

record-based. It follows that they could *not* have been raised in a post-conviction petition. *Id.*

Switching to the appellate-counsel claim, an attorney *did* present this claim in a special application to reopen Hutton's direct appeal, and the Ohio Supreme Court rejected it on the merits. Pet. App. 26a, 247a-248a, 254a-256a. *Martinez* and *Trevino* "do[] not apply to claims that were fully adjudicated on the merits in state court because those claims are, by definition, not procedurally defaulted." *Morris v. Carpenter*, 802 F.3d 825, 844 (6th Cir. 2015).

In sum, Hutton's ineffective-assistance claims are either waived or meritless. They provide no reason for this Court to decline to resolve the circuit split concerning the actual-innocence exception.

II. HUTTON DOES NOT JUSTIFY THE SIXTH CIRCUIT'S EXTENSION OF *RING* TO BAR APPELLATE REWEIGHING OF A WEIGHING-STAGE ERROR

As the petition also showed, the decision below warrants review because it blurred the line between (1) errors concerning death-penalty eligibility (where the Sixth Amendment restricts appellate reweighing) and (2) errors concerning the discretionary decision of whether to impose the death penalty (where the Eighth Amendment permits appellate reweighing). Pet. 27-37. Here, at the guilt phase, the jury found two aggravating circumstances that made "Hutton's eligibility for the death penalty . . . indisputable." Pet. App. 48a-49a (Rogers, J., dissenting). Yet the Sixth Circuit relied on *Ring* and *Hurst v. Florida*, 136 S. Ct. 616 (2016), to hold that later errors during

the weighing stage could not be cured by appellate reweighing. Pet. App. 22a-25a.

Hutton's responses do not diminish the need for review. He simply doubles down on the Sixth Circuit's decision *on the merits*, arguing that a jury must find that "an aggravating circumstance outweighs the mitigating factors" because it is a "predicate fact necessary to impose a death sentence" within the meaning of the Sixth and Eighth Amendments. Opp. 13; *cf.* Pet. App. 39a n.1 (Merritt, J., concurring). This reading conflicts with this Court's cases, with cases from other circuits, and with Ohio law.

Start with this Court's cases. *Ring* held that, in capital cases, "any *fact* on which the legislature conditions an increase in the[] maximum punishment" must be found by a jury. 536 U.S. at 589 (emphasis added). Its holding did "not question the [state court's] authority to reweigh the aggravating and mitigating circumstances" under *Clemons*. *Id.* at 597 n.4. *Hurst* did not alter this framework. That is because, far from a factual question, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). And that is why the State can authorize a death sentence when the jury finds that the aggravating and mitigating circumstances are in equipoise. *See Kansas v. Marsh*, 548 U.S. 163, 165-66 (2006). Regardless, this *merits* issue is beside the point at this stage. Even if *Ring* or *Hurst* did overrule *Clemons* and *Marsh*, the Court should take this case to clarify the law in this important area.

In that regard, Hutton says *nothing* about the disagreement in the appellate courts on this issue. Pet. 35-37. Unlike the decision below, other cases have held that the Sixth Amendment does "not require a jury to do the weighing." *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007). The Alabama Supreme Court has held the same even after *Hurst*. *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5-6 (Ala. Sept. 30, 2016). Whether or not Hutton is correct on the merits, this judicial disagreement warrants the Court's attention.

Finally, this case provides a good vehicle to consider the question. Contrary to Hutton's argument (Opp. 13-14), state law does *not* require a jury to find that the aggravating circumstances outweigh the mitigation evidence to make a defendant death-penalty *eligible*. In Ohio, "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because '[it] cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Belton*, 2016-Ohio-1581 ¶ 60 (citation omitted). Instead, weighing "amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible." *Id.* (citation omitted). To claim the contrary, Hutton ignores *Belton*, invoking in its place a random Delaware case and an Ohio dissent. Opp. 14. But Ohio is not Delaware, and dissenting opinions are not majority opinions. *Belton* shows that Hutton cannot insulate this federal question from review under any state-law theory.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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